88-1234

No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

UNITED SERVICES AUTOMOBILE ASSOCIATION,
AN UNINCORPORATED ASSOCIATION,
*Petitioner,*

versus

LEROY TUCK, ADMINISTRATOR OF THE ESTATE OF JOHNNY L. TUCK, DECEASED, LEROY TUCK, AN INDIVIDUAL AND DOROTHY TUCK, AN INDIVIDUAL,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## PETITION FOR WRIT OF CERTIORARI

Petitioner and defendant/appellant below, United Services Automobile Association, an unincorporated association, respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review its decision in the appeal styled *Tuck v. United Services Automobile Association,* Docket Number 85-2770.

## QUESTIONS PRESENTED FOR REVIEW

1. Whether, having determined that the trial court lacked jurisdiction of the subject matter of this action, the Tenth Circuit had power to remand this case to allow the district court to attempt to create subject matter jurisdiction retroactively.

2. Whether the Tenth Circuit had power to remand to consider imposition of sanctions when the court had no jurisdiction of the subject matter of the litigation in the first instance.

## STATEMENT OF PARTIES TO THIS PROCEEDING

The caption contains the names of all actual parties to this action. Since imposition of sanctions is an issue, however, petitioner's former counsel of record, Mr. Dan Rogers, would have a potential interest in this matter. Further, plaintiffs below may be granted leave to amend to change the party defendant. Thus, petitioner cannot at present provide the Court with the names of additional individuals who might become parties to this litigation upon amendment.

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## OFFICIAL CITATION OF THIS DECISION

*Tuck v. United Services Automobile Association,* 859 F.2d 842 (10th Cir. 1988).

## GROUNDS UPON WHICH JURISDICTION IS INVOKED

A. The opinion sought to be reviewed was rendered on October 10, 1988.

B. USAA's petition for rehearing was denied on November 10, 1988.

C. This Court is conferred jurisdiction to review the judgment in question under 28 U.S.C. § 1254(1) (1982).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. III provides, in pertinent part:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different

States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make . . . .

28 U.S.C. § 1332 (1982) provides:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally

in the Federal court is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business; *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 2106 (1982) provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such

> appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 1653 (1982) provides:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Fed. R. Civ. P. 12 provides, in pertinent part:

> . . . .
>
> (h) Waiver or Preservation of Certain Defenses.
>
> . . . .
>
> (3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

## STATEMENT OF THE CASE

Plaintiffs-appellees Leroy Tuck, Administrator of the estate of Johnny L. Tuck, deceased, Leroy Tuck, an individual, and Dorothy Tuck, an individual, ["the Tucks"] brought this action against the defendant-appellant United Services Automobile Association ["USAA"] attempting to invoke jurisdiction in the federal court on the basis of diversity of citizenship. The Tucks commenced their action with allegations of breach of contract, breach of the implied covenant of good faith and fair dealing, and intentional infliction of emotional distress. The Tucks sued under the uninsured motorist coverage of the USAA policy issued to the decedent, Johnny L. Tuck, and alleged that USAA acted in "bad faith". The Tucks did not sue the uninsured motorist.

As the basis for jurisdiction, the Tucks alleged they were "residents" of the state of Oklahoma and USAA was a "foreign corporation". As is recognized by the Tenth Circuit in its opinion, the jurisdictional allegations contained in the Complaint were defective on their face, since the Tucks failed to allege either the place of incorporation or the principal place of business of USAA. (In addition, USAA notes that it is citizenship and not residency which bears on the determination of diversity jurisdiction.) USAA's Answer contained an admission of those jurisdictional allegations, later incorporated into the Pretrial Order. USAA is an unincorporated association, which consists of military officers throughout the United States. The record is devoid of any affirmative indication that the district court ever actually considered the question of subject matter jurisdiction. The case was tried in that jurisdictional posture. The trial resulted in a verdict for the Tucks. USAA appealed from the judgment entered thereon.

On appeal, USAA raised the lack of subject matter jurisdiction by way of a motion to dismiss. USAA argued that it is not a corporation, but is instead an unincorporated association. USAA's citizenship must be measured by the citizenship of its members.

After oral argument and additional briefing by the parties, the Tenth Circuit determined there is no subject matter jurisdiction. It further correctly decided the jurisdictional defect could not be remedied, on appeal or otherwise, by a simple dismissal of a "non-diverse" party. However, the Tenth Circuit remanded to the district court, not for dismissal, but rather for a determi-

nation of whether "the Tucks could have originally framed this action against USAA in such a way as to properly invoke diversity jurisdiction . . . ." 859 F.2d at 846.

The Tenth Circuit continued by anticipating that:

> the Tucks and the district court may not be able to find a way out of this particular jurisdictional quagmire, forcing dismissal of the action. Should that occur, we direct the district court to consider the need for sanctions against USAA and/or its attorneys for allowing an action which they should have known to be improper to proceed . . . .

*Id.*

The Tenth Circuit denied USAA's Petition for Rehearing and the Mandate issued. USAA now petitions for writ of certiorari.

## ARGUMENTS AND AUTHORITIES

The reasons advanced by petitioner for the issuance of a writ of certiorari may be summarized as follows:

FIRST, the Tenth Circuit requires, on remand, an illegitimate exercise of power. The instructions on remand fall outside the jurisdictional parameters of U.S. Const. art. III and those conferred by Congress under 28 U.S.C. § 1332 (1982). These jurisdictional excesses require the exercise of this Court's supervisory power.

SECOND, the Tenth Circuit decides two important questions of federal jurisdiction which have not been, but should be, directly addressed

by this Court. Those two issues are: whether a federal district court, without jurisdiction in the first instance, may allow amendments which substantively alter the character of the litigation in order to retroactively create jurisdiction; and whether that court, after a final determination that jurisdiction does not exist and cannot be conferred, has the power to assess sanctions against the parties litigant and counsel.

THIRD, the decision of the Tenth Circuit with respect to both issues, *i.e.,* amendment to create jurisdiction and sanctions, is in conflict with the decisions of other circuits. Those circuits' decisions are themselves in conflict. The Tenth Circuit decision further confuses the issue. The conflicts are of substantial importance to litigants and the courts alike and should be resolved.

The Tenth Circuit acknowledges its own and the district court's lack of subject matter jurisdiction; it proceeds, however, to exercise judicial power by instructing the district court on remand to entertain amendments to the pleadings and to consider the imposition of sanctions. This Court has supervisory power, which it should wield, to prevent the illegitimate exercise of power by the federal courts. U.S. Const. art. III vests the federal judiciary with the *only* power it possesses. The Constitution marks the extreme limit of the jurisdiction of the federal courts. *Hodgson v. Bowerbank,* 9 U.S. (5 Cranch) 303 (1809). There Justice Marshall succinctly stated "Turn to the article of the constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the constitution." 9 U.S. at 304.

While petitioner recognizes the power of every court to determine its own jurisdiction (and the apparent power of the courts to maintain the status quo while doing so, *United States v. United Mine Workers of America,* 330 U.S. 258 (1947) ), once a lack of jurisdiction is found, the authority of the court ceases. "[I]f the command was in whole or in part beyond the power of the court, . . . so much as was in excess of jurisdiction . . . was void. . . . Such is the settled rule of decision in this Court." *Ex parte Rowland,* 104 U.S. 604, 612 (1881). *See also Ex parte Fisk,* 113 U.S. 713 (1885). The effect of the court's instructions on remand is precisely that: a command beyond the power of the court. After conclusively deciding the jurisdictional issue adversely to the Tucks, the Tenth Circuit mandates additional proceedings which are clearly outside both its appellate authority and the district court's power.

It is axiomatic that subject matter jurisdiction, where it does not otherwise exist, cannot retroactively be created, by amendment or otherwise. *Anderson v. Watt,* 138 U.S. 694 (1891).

Here the appellate court's remand instructions brazenly go much further than directing the amendment of the plaintiffs' jurisdictional *allegations. See* 28 U.S.C. § 1653 (1982). They direct the district court and the Tucks to change the very substance of the action by completely changing the parties, if possible. The mandate exceeds the federal court's jurisdictional bounds and is an illegitimate exercise of power. It is just such usurpations of power which fall within the supervisory power of this Court. This Court should wield that supervisory power to review those actions by writ of certiorari.

The Court of Appeals travels one step farther down the road and mandates that, if no retroactive jurisdiction can be found, the district court consider the imposition of sanctions. (The court's opinion provides no guidance respecting the source of this authority to impose sanctions.) Interestingly, the Tenth Circuit instructs the district court, on remand, to "side" with the Tucks in an effort to create jurisdiction or, in the alternative, to impose sanctions. At this stage of the proceedings, the district court is, apparently, to abandon its role as an impartial arbitrator and become an advocate. But leaving aside the serious issue of whether sanctions should be imposed upon *defendant* for failing to call into question the very subject matter jurisdiction which the plaintiff always has the burden of properly pleading and proving, the Tenth Circuit now clearly voices its mandate to the district court to entertain judicial proceedings for imposition of sanctions in a case in which subject matter jurisdiction, by its own terms, has been negated.

This Court's decision in *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinea,* 456 U.S. 694 (1982), while not directly addressing the precise issue now before the Court, makes clear that lack of subject matter jurisdiction negates the power of a court to act. "[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception . . . ." 456 U.S. at 702 (1982) (quoting *Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan,* 111 U.S. 379, 382 (1884) ).

Therefore, in a general sense, the rule is clear, both from the Constitutional foundations of

the federal judicial power and from the decisions of this Court, that where subject matter jurisdiction has been found lacking, there is an absence of power to act. The cases cited above, however, admittedly do not directly address the precise issues here raised. Not since amendment of jurisdictional allegations has been authorized by statute has this Court expressly determined the extent of a court's power to allow amendments of jurisdictional allegations, nor has it delineated the bounds of that power. Neither has this Court directed its attention to the power of a federal court, in the face of an express finding of lack of jurisdiction, to impose sanctions on either parties litigant or counsel in the very proceeding in which jurisdiction is lacking. (The Court's decision in *Compagnie Des Bauxites De Guinea* does not address the issue, dealing as it does with a fundamentally different aspect of jurisdiction, that of personal jurisdiction.)

The burgeoning caseload of the federal courts and the prevalence of cases in which plaintiffs seek (sometimes successfully) amendments that change the very substance of their cases provide ample evidence that the issue is one of substantial importance, both to the courts and to litigants. Likewise, whether a district court has power to impose sanctions in a proceeding in which lack of subject matter jurisdiction has already been decided is an issue of undeniable importance. The issue raises the specter of jurisdiction obtained by means of indirection, where a coı rt may, as was requested by plaintiff here, impose the equivalent of a damages verdict in the name of sanctions. Such actions violate the fundamental rights

of the parties to trial by a court of competent jurisdiction and endanger the very concept of limited jurisdiction of the federal judiciary.

These issues involve the very nature of the judicial system as one of limited jurisdiction, with its constitutional overtones and considerations of federalism. They are ones upon which the various circuits have adopted diverse views. The Tenth Circuit's decision only further confuses an area of divergent opinions.

The Tenth Circuit would allow amendments which alter the very nature of the case, possibly by dismissing the only defendant, adding others as defendants who happen to be "diverse" from plaintiffs, but leaving other members of the association unnamed. The Tenth Circuit has clearly expressed the opinion that it is permissible to allow amendments which contemplate a change in the very identity of the parties to the litigation, in the name of "perfecting" jurisdiction, basing its decision, to some extent, on *Jett v. Phillips & Associates,* 439 F.2d 987 (10th Cir. 1971).

The Second Circuit has expressed a view similar to that taken by the Tenth Circuit, although apparently not as sweeping. In *Jaser v. New York Property Insurance Underwriting Association,* 815 F.2d 240 (2nd Cir. 1987), the appellate court reversed the dismissal of an action where leave to amend was denied. Without discussing the source of authority to allow amendments, the court took a so-called "flexible approach", concluding that "very few cases should be terminated due to the absence of nondiverse parties . . . ." 815 F.2d at 242. The court then proceeded to explain that non-diverse members of the defendant associa-

tion could be dismissed and the judgment reduced by their proportionate share of the damages.

The D.C. Circuit, in *Long v. District of Columbia,* 820 F.2d 409 (D.C. Cir. 1987) expressed a similar opinion: "[W]e can see no reason to respond to the jurisdictional error by throwing out Long's entire suit and erasing nearly four years of litigation." 820 F.2d at 417.

Several other circuits which have addressed the question of amendments of jurisdictional allegations have refused to allow such amendments. For example, in the Fifth Circuit a contrary view is well established. *Aetna Casualty & Surety Co. v. Hillman,* 796 F.2d 770, 776 (5th Cir. 1986) ("Jurisdiction cannot be created retroactively by substituting a diverse claimant for a nondiverse party.") *See also Oliney v. Gardner,* 771 F.2d 856 (5th Cir. 1985); *Boelens v. Redman Homes, Inc.,* 759 F.2d 504 (5th Cir. 1985); *Gaines v. Dixie Carriers, Inc.,* 434 F.2d 52 (5th Cir. 1970). The Third Circuit also subscribes to this contrary position, *Field v. Volkswagenwerk AG,* 626 F.2d 293 (3rd Cir. 1980), as does the Ninth Circuit, *Rockwell International Credit Corp. v. United States Aircraft Insurance Group,* 823 F.2d 302 (9th Cir. 1987).

Taking a more absolute position, the Eighth Circuit has expressed a view that once a lack of subject matter jurisdiction has been determined, it is improper to proceed further. *Kansas-Nebraska Natural Gas Co. v. City of St. Edward, Nebraska,* 234 F.2d 436 (8th Cir. 1956). The jurisdiction of the appellate court extends no further

than correcting the district court's error in entertaining the action. *Kern v. Standard Oil Co.*, 228 F.2d 699 (8th Cir. 1956).

Clearly the conflicts between the circuits are serious and evidence a more fundamental difference than would appear on the surface. The approaches of the Tenth, Second, and D.C. Circuits, to different degrees, evidence an extremely cavalier attitude toward the most basic tenet of federal jurisprudence, and this Court should provide the guidance needed to resolve the conflict. This type of judicial fiction in the name of "perfecting jurisdiction" is simply untenable and is at odds with the better-reasoned approach of the other circuits.

Similarly, there is a direct conflict among the circuits regarding the federal courts' power to assess "sanctions" against individual parties and attorneys where there is no subject matter jurisdiction. While petitioner recognizes the inherent power of the federal courts to control members of the bar by way of disciplinary proceedings, we are faced here with an entirely different situation. This, then, is the situation: The Tenth Circuit has already determined that subject matter jurisdiction does not exist. Failing the district court's ability to *create* jurisdiction where none exists, the court of appeals instructs the district court to continue its exercise of judicial power *in this case* to consider the imposition of sanctions. The district court is instructed to proceed against either the party defendant (not properly before a court without subject matter jurisdiction) or the attorney (who may be subject to a separate disciplinary procedure under the rules of the federal district court in which he practices). Presumably,

by converting this action from a civil proceeding to one disciplinary in nature, the sanctions imposed could inure to the benefit of the plaintiffs. The Tenth Circuit, in prior cases, has expressed its opinion that sanctions may be imposed absent primary judicial power, *see, e.g., Basso v. Utah Power & Light Co.*, 495 F.2d 906 (10th Cir. 1974), as apparently has the Third Circuit, *Rubin v. Buckman*, 727 F.2d 71 (3rd Cir. 1984).

Other circuits, however, have expressed the view that sanctions cannot be imposed where there is no subject matter (as distinguished from personal) jurisdiction. *See, e.g., Davis v. Cluet, Peabody & Co.*, 667 F.2d 1371 (11th Cir. 1982). In *Cluet, Peabody & Co.*, the court specifically dealt with the issue of sanctions and noted "we could not uphold such action in the absence of subject matter jurisdiction . . . ." 667 F.2d at 1373 (citing *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951) ).

The effect of the Tenth Circuit's instructions on remand is to subject USAA to the judicial power of the federal courts where the lack of subject matter jurisdiction, and thus the *lack of power to act*, has already been determined. The issues in this Petition for Writ of Certiorari are of substantial significance, both to the litigants here, and to the general administration of justice in the federal system. They have not been directly addressed by this Court, although they should be. They are subject to differing opinions and practices throughout the various circuits.

Petitioner respectfully requests that its petition be granted and the writ issued, the Tenth Circuit's opinion be vacated with respect to the

instructions on remand, and this case be dismissed for lack of subject matter jurisdiction.

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## APPENDIX

A. Copy of the Opinion of the Tenth Circuit to be reviewed.

B. Copy of the Order denying rehearing.

*PUBLISH*

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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No. 85-2770

LEROY TUCK, ADMINISTRATOR OF THE ESTATE OF JOHNNY L. TUCK, DECEASED, LEROY TUCK, INDIVIDUALLY, AND DOROTHY TUCK, INDIVIDUALLY,
Plaintiffs-Appellees,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, A CORPORATION,
Defendant-Appellant.

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[Filed October 14, 1988]

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. NO. 83-C-175-C)

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Patrick E. Carr, Carr & Carr, Tulsa, Oklahoma, for Plaintiffs-Appellees.

Linda G. Alexander, Niemeyer, Noland & Alexander, Oklahoma City, Oklahoma, for Defendant-Appellant.

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Before ANDERSON and BALDOCK, Circuit Judges, and PARKER,* District Judge.

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ANDERSON, Circuit Judge.

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* Hon. James A. Parker, U.S. District Court, New Mexico, sitting by designation.

United Services Automobile Association (USAA) appeals from an adverse judgment, claiming, among other things, that the judgment was entered without subject matter jurisdiction. We remand to the district court for further consideration of the jurisdictional question.

I.

In May 1982, Marine Corps Captain Johnny L. Tuck was killed in an automobile accident caused by an uninsured motorist.[1] Captain Tuck was insured by appellant USAA. Captain Tuck's parents, Leroy and Dorothy Tuck, appellees here, sought benefits under the uninsured motorist provision of the USAA policy. Their claim was effectively denied by USAA, and the Tucks brought this action under the diversity jurisdiction of the federal courts alleging (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) intentional infliction of emotional distress. The case was tried before a jury in the District Court for the Northern District of Oklahoma. The jury returned a verdict for the Tucks on all three claims. The jury awarded $100,000.00 as damages for breach of the insurance contract, $200,000.00 in actual damages and $500,000.00 in punitive damages for bad faith breach of the insurance contract, and $50,000.00 actual damages and $50,000.00 punitive damages for intentional infliction of emotional distress. After trial, USAA filed a motion for judgment notwithstanding the verdict, or in the alternative,

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[1]The uninsured motorist later pleaded guilty to a charge of negligent homicide and was not a party to this action.

for a new trial. The district court denied both motions, but did reduce the actual damage award for the bad faith claim to $75,000.00.

USAA filed a timely notice of appeal from the judgment. Several months after the appeal was filed, USAA filed with this court a motion to dismiss the action based on a lack of subject matter jurisdiction. USAA argued that there was a lack of complete diversity between the parties, requiring dismissal of the Tucks' action by this court. This was the first time that USAA had raised the question of subject matter jurisdiction.

The Tucks' complaint alleged that USAA was a "foreign corporation." R. Vol. I, Tab 1. USAA's answer admitted that allegation. *Id.* at Tab 6. The pretrial order incorporated those jurisdictional findings. *Id.* at Tab 37. On appeal, USAA revealed, for the first time, that it was not a corporation, but rather an unincorporated association organized under the insurance laws of the state of Texas. USAA correctly argued that the membership of an unincorporated association, for purposes of diversity jurisdiction, is the citizenship of all of its members. *See Arbuthnot v. State Automobile Ins. Ass'n,* 264 F.2d 260, 261-62 (10th Cir. 1959). Because some members of USAA are citizens of Oklahoma, the home of the Tucks, USAA urged that complete diversity was lacking, and the federal courts had no power to hear this case. *See Owen Equip. and Erection Co. v. Kroger,* 437 U.S. 365, 373-74 (1978) (requirement of complete diversity).

II.

The Federal Rules of Civil Procedures direct that "[w]henever it appears by suggestion of the

parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3). "A court lacking jurisdiction cannot render judgment but must dismiss the cause *at any stage* of the proceedings in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974) (emphasis in original). "If the parties do not raise the question of lack of jurisdiction, it is the duty of the federal court to determine the matter *sua sponte*. Therefore, lack of jurisdiction cannot be waived and jurisdiction cannot be conferred upon a federal court by consent, inaction or stipulation." *Id.* (citations omitted).[2] *See Insurance Corp. of Ireland, Ltd. v. Campagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court . . . . [A] party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.").

"[F]or purposes of diversity jurisdiction, the citizenship of an unincorporated association is the citizenship of the individual members of the association." *Jett v. Phillips & Associates*, 439 F.2d 987, 990 (10th Cir. 1971); *see United Steel-*

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[2]The appellees ask that we follow *Ferguson v. Neighborhood Housing Services*, 780 F.2d 549, 551 (6th Cir. 1986) where the court held that there was a "distinction between an admission that federal subject matter jurisdiction exists, and an admission of facts serving in part to establish federal subject matter jurisdiction." Even were we to agree with this reasoning, it would be of no avail to the Tucks here because the jurisdictional allegations in the complaint were defective on their face. The Tucks failed to allege either a place of incorporation or a principal place of business for USAA. USAA can hardly be deemed to have admitted facts that were never alleged. *See also Fitzgerald v. Seaboard System R.R., Inc.*, 760 F.2d 1249, 1251 (11th Cir. 1985); *Basso*, 495 F.2d at 909-10.

*workers of America v. Bouligny, Inc.*, 382 U.S. 145 (1965); *see generally* 13B C. Wright, A. Miller, E. Cooper, *Federal Practice & Procedure* § 3630 (2d ed. 1984). This rule has been frequently criticized because often, as in this case, an unincorporated association is, as a practical matter, indistinguishable from a corporation in the same business. *See Bouligny*, 382 U.S. at 149-53; *Arbuthnot*, 264 F.2d at 262; *see also* 3A J. Moore & J. Lucas *Moore's Federal Practice*, ¶ 17.25, at 17-209 (1987 rev.) ("Congress should remove the one remaining anomaly and provide that where unincorporated associations have entity status under state law, they should be treated as analogous to corporations for purposes of diversity jurisdiction."). Unfortunately, while we may not like this requirement, and the results which sometimes follow, we do not have the power to change it.

This is not the first time that USAA has faced this problem. In *Baer v. United Services Automobile Ass'n*, 503 F.2d 393 (2d Cir. 1974), plaintiff Baer appealed a judgment in favor of USAA to the Second Circuit. The Court of Appeals raised the question of jurisdiction *sua sponte*, and after a careful evaluation of USAA's status under Texas law, determined that, for diversity purposes, USAA was properly considered a citizen "of each and every state in which [it] has members." *Id.* at 395. The Tucks offer nothing that persuades us to depart from the holding in *Baer*.[3] Accordingly, we

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[3]Adding to the confusion is the fact that USAA has appeared in federal courts under their diversity jurisdiction, even after the decision in *Baer*, both as plaintiff and defendant, and the question of USAA's corporate status and citizenship was apparently not considered. *See, e.g., Gill v. Rollins Protective Services Co.*, 836 F.2d 194 (4th Cir. 1987) (USAA as plaintiff); *Moore v. United Services Automobile*

are forced to conclude that, as the case now stands, there is not complete diversity among the parties and subject matter jurisdiction is lacking.

We are not prepared, however, to grant USAA's motion to dismiss the action, for it is well-settled that nondiverse parties may be dismissed in order to preserve diversity jurisdiction. *Miller v. Leavenworth-Jefferson Elec. Coop., Inc.*, 653 F.2d 1378, 1382 (10th Cir. 1981); *Jett*, 439 F.2d at 989-90; *see Harris v. Illinois-California Express, Inc.*, 687 F.2d 1361, 1369 (10th Cir. 1982) ("a nondiverse party whose presence is not essential under Rule 19, . . . may be dropped to achieve diversity"); 7 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 1685, at 457 (2d ed. 1986) ("Courts frequently employ Rule 21 to preserve diversity jurisdiction over a case by dropping a nondiverse party if his presence in the action is not required under Rule 19."). "The court may dismiss a nondiverse party in order to achieve diversity even after judgment has been

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*Ass'n*, 819 F.2d 101 (5th Cir. 1987) (USAA as defendant); *Boardman v. United Services Automobile Ass'n*, 742 F.2d 847 (5th Cir. 1984) (USAA as defendant-appellee); *United Services Automobile Ass'n v. Royal-Globe Ins. Co.*, 511 F.2d 1094 (10th Cir. 1975) (USAA as plaintiff-appellee); *Allen v. United States*, 668 F. Supp. 1242 (W.D. Wis. 1987) (USAA as defendant); *United Services Automobile Ass'n v. Cregor*, 617 F. Supp. 1053 (N.D. Ill. 1985) (USAA as plaintiff). A few of these cases even recite erroneous findings regarding USAA's diversity status. *See, e.g., Allen*, 668 F. Supp. at 1245 (USAA "is a Texas insurance corporation with its principal place of business in the State of Texas."). Of course, the fact that USAA has improperly appeared as a party in diversity actions before does not affect our decision here, but it helps to explain why the Tucks did not discover the jurisdictional problem.

Because USAA has apparently "rediscovered" *Baer*, however, and asked us to dismiss this action for lack of subject matter jurisdiction, we expect it to make similar motions in all pending diversity litigation. Moreover, we do not expect to see USAA before this court again under similar circumstances.

entered." *Publicker Indust., Inc. v. Roman Ceramics Corp.*, 603 F.2d 1065, 1069 (3d Cir. 1979); *see Long v. District of Columbia*, 820 F.2d 409, 416 (D.C. Cir. 1987). Moreover, several circuits have held that courts of appeals may preserve diversity jurisdiction by dismissing nondiverse parties on appeal. *See Long*, 820 F.2d at 417; *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523-24 (9th Cir. 1987); *Jaser v. New York Property Ins. Underwriting Ass'n*, 815 F.2d 240, 243 (2d Cir. 1987); *but see Newman-Green, Inc. v. Alfonzo-Larrain*, 854 F.2d 916 (7th Cir. 1988) (en banc) (appeals court has no power to dismiss nondiverse party; remanded to district court).

Relying on these cases, the Tucks have filed in this court a motion to dismiss those members of USAA who are Oklahoma citizens. After a careful review of the Tucks' motion and the applicable law, however, we have determined that even if we have the power to dismiss nondiverse parties on appeal, the question is more appropriately remanded to the district court.

There are several factors which complicate the Tucks' belated effort to perfect diversity and require the attention of the district court. First, the suit was filed against USAA as an entity, not against the individual members of the association.[4] Therefore, a motion to dismiss the nondiverse members is not sufficient to create complete diversity because USAA, with its ubiquitous citizenship, remains a party to the action.

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[4]The capacity of an unincorporated association to be sued in its own name is generally "determined by the law of the state in which the district court is held." Fed. R. Civ. P. 17(b). An unincorporated association may be sued under Oklahoma law. *Okla. Stat. Ann.* tit. 12, § 2017(B) (Supp. 1988).

*Cf. Kaplan Co. v. Industrial Risk Insurers,* 86 F.R.D. 484, 486 & n.5 (E.D. Penn. 1980) (District court concluded that "plaintiff may proceed in the absence of the association *qua* association and those of its members whose presence would destroy diversity."). It appears to us that the Tucks must now move to dismiss USAA from the suit and then add the diverse members of the association as defendants.[5] Therein lies the second problem, for the district court must determine if the Tucks, at this stage, may amend the complaint to add USAA's diverse members under Rule 19, and whether that amendment relates back to the filing of the complaint pursuant to Rule 15(c). *See Jaser,* 815 F.2d at 244 (service upon association constitutes service on all the individual members providing sufficient notice so that the amended complaint related back for statute of limitations purposes); *see also Anderson v. Deere & Co.,* 852 F.2d 1244, 1247 (10th Cir. 1988); *Trombino v. Transit Casualty Co.,* 110 F.R.D. 139, 141-43 (D.R.I. 1986); *Kaplan,* 86 F.R.D. at 491. The district court may also be required to determine if USAA, as an entity, may be dropped from the suit as a party that is not indispensable and whether the Oklahoma members of USAA are indispensable parties who must be joined. *See* Fed. R. Civ. P. Rules 19, 21; *cf. Jaser,* 815 F.2d at 243; *Prescription Plan Serv. Corp. v. Franco,* 552 F.2d 493,

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[5]We stress that this is our view of the limited jurisdictional record on appeal, but we do not intend to foreclose the district court from reviewing this question. The district court should determine whether or not the *members* of USAA may currently be considered parties to this action and whether the Tucks may proceed against only the diverse members. If the *members* are already parties to the suit, then a motion to dismiss USAA and the nondiverse members may be sufficient to create complete diversity.

496-98 (2d Cir. 1977); *Grand Sheet Metal Products Co. v. Aetna Casualty and Surety Co.*, 500 F. Supp. 904, 906 (D. Conn. 1980); *Kaplan*, 86 F.R.D. at 489-91.

Fairness and the need to conserve judicial resources all weigh in favor of allowing the Tucks to amend the complaint so that this action may reach a conclusion in federal court. As the District of Columbia Circuit commented in similar circumstances: "we can see no reason to respond to the jurisdictional error by throwing out Long's entire suit and erasing nearly four years of litigation. 'Judicial economy, convenience and fairness to litigants' all counsel the opposite course." *Long*, 820 F.2d at 417 (citation omitted); *see Newman-Green, Inc.*, 854 F.2d at — (Easterbrook, J., dissenting). While we can offer little detailed guidance to the district court in this matter, the most important inquiry is a practical one: If the Tucks could have originally framed this action against USAA in such a way as to properly invoke diversity jurisdiction, it seems pointless to dismiss the suit and force a refiling at this stage, provided, of course, that USAA is not prejudiced by allowing the Tucks to amend their pleadings.

We fully understand, however, that the Tucks and the district court may not be able to find a way out of this particular jurisdictional quagmire, forcing dismissal of the action. Should that occur, we direct the district court to consider the need for sanctions against USAA and/or its attorneys for allowing an action which they should have known to be improper to proceed, and the enormous waste of judicial time and resources. *See Basso*, 495 F.2d at 911; *see also Rockwell Int'l Credit Corp. v. United States Aircraft Ins. Group,*

823 F.2d 302, 305 (9th Cir. 1987); *Eisler v. Stritzler*, 535 F.2d 148, 152 (1st Cir. 1976); *Itel Containers Int'l Corp. v. Puerto Rico Marine Management, Inc.*, 108 F.R.D. 96, 102-06 (D.N.J. 1985).

III.

USAA raises an alternative jurisdictional argument that we can dismiss from further consideration. USAA argues that diversity jurisdiction is precluded by 28 U.S.C. § 1332(c), which provides in pertinent part:

> "[I]n any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen."

We have reviewed the decisions applying this provision carefully and conclude that it is not applicable to the Tucks' claims against USAA. As the Eleventh Circuit recently explained:

> "[This] section was enacted by Congress in order to eliminate the basis for diversity jurisdiction in states that allow an injured third-party claimant to sue an insurance company for payment of a claim without joining the company's insured as a party, where the insured would be a nondiverse party, even tho

> icy limits or in good faith, the section 1332(c) direct action proviso does not preclude diversity jurisdiction."

*Fortson v. St. Paul Fire and Marine Ins. Co.*, 751 F.2d 1157, 1159 (11th Cir. 1985). In an action similar to that filed by the Tucks, the Ninth Circuit adopted a similar application of the statute, holding that "unless the cause of action urged against the insurance company is of such a nature that the liability sought to be imposed could be imposed against the insured, the action is not a direct action." *Beckham v. Safeco Ins. Co. of America*, 691 F.2d 898, 902 (9th Cir. 1982) (quoting *Walker v. Firemans Fund Ins. Co.*, 260 F. Supp. 95, 96 (D. Mont. 1966) ). As in *Beckham*, this is clearly not a direct action since the Tucks are not seeking to impose liability on USAA for the negligence of any party insured by USAA.[6] *See also McGlinchey v. Hartford Accident and Indemnity Co.*, 666 F. Supp. 70, 71 (E.D. Pa. 1987) (direct action provision doesn't bar suit under uninsured motorist provision); *Irvin v. Allstate Ins. Co.*, 436 F. Supp. 575, 576-77 (W.D. Okla. 1977) (same); 13B *Federal Practice & Procedure*, § 3629, at 674-75 (direct action provision not applicable to suits under uninsured motorist provisions or for bad faith refusal to settle claims). Moreover, USAA offers no authority to suggest that the direct action provision of the diversity statute would be applicable to this case.

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[6]There appears to be some dispute between the parties as to whether the Tucks are themselves "insured" under the USAA policy. We do not address this question, but in either case, the direct action statute is not a bar to this suit, for "[t]he general rule has always been that the direct action proviso does not affect suits brought by an insured against his own insurer." *Bowers v. Continental Ins. Co.*, 753 F.2d 1574, 1576 (11th Cir.), *cert. denied*, 473 U.S. 906 (1985).

For the reasons explained above, we REMAND this action to the district court for appropriate motions by the plaintiffs and further proceedings consistent with this opinion.

*NOVEMBER 10, 1988*

Before Honorable Stephen H. Anderson, Honorable Bobby R. Baldock, Circuit Judges, and Honorable James A. Parker, District Judge*

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No. 85-2770

LEROY TUCK, ADMINISTRATOR OF THE ESTATE OF JOHNNY L. TUCK, DECEASED, LEROY TUCK, AN INDIVIDUAL AND DOROTHY TUCK, AN INDIVIDUAL,

Plaintiffs-Appellees,

VS.

UNITED SERVICES AUTOMOBILE ASSOCIATION, A CORPORATION,

Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned case.

Upon consideration whereof, the petition for rehearing is denied.

/s/ROBERT L. HOECKER,
Clerk

* Of the United States District Court for the District of New Mexico, sitting by designation